STATE OF WISCONSIN

SUPREME COURT

In re:

WISCONSIN STATUTES §§ 901.07, 906.08, 906.09, and 906.16

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF AMENDED PETITION OF WISCONSIN JUDICIAL COUNCIL FOR AN ORDER AMENDING WIS. STATS. §§ 901.07, 906.08, 906.09; AND CREATING WIS. STAT. § 906.16

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ON BEHALF OF THE WISCONSIN JUDICIAL COUNCIL

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INTRODUCTION

The Wisconsin Judicial Council respectfully petitions the Wisconsin Supreme Court to amend WIS. STATS. §§ 901.07, 906.08, and 906.09; and create WIS. STAT. § 906.16. This petition is directed to the Supreme Court's rule-making authority under WIS. STAT. § 751.12.

PROCEDURAL HISTORY

On April 19, 2016, Attorney April M. Southwick filed a petition on behalf of the Wisconsin Judicial Council requesting that the court amend Wis. Stats. §§ 901.07, 906.08, and 906.09, and create Wis. Stat. § 906.16 (a new "bias rule").

The court discussed the Judicial Council's petition at its open rules conference on May 12, 2016, and voted to schedule a public hearing. The court conducted a public hearing on October 24, 2016. At the ensuing open rules conference, the court discussed the petition and raised a number of questions before voting to return the petition to the Judicial Council.

DISCUSSION

I. Recommended Amendments

A. Wis. Stat. § 901.07, Remainder of or related writings or recorded statements

Often referred to as the rule of completeness, Wisconsin's Rule 901.07 focuses on written utterances, which has caused confusion regarding the rule's application to oral statements. The Judicial Council recommends amending this rule to specifically include unrecorded statements. This recommendation is a move away from federal Rule 106

upon which Wisconsin's rule is currently based, and more closely aligns Wisconsin's rule with the common law doctrine of completeness, consistent with Wisconsin case law.

In *State v. Eugenio*, the defense extensively cross-examined the victim about perceived inconsistencies in her statements to other individuals.[1] Under Rule 901.07, the court permitted the State to offer the challenged statements in their entirety, to show consistency on significant factual issues. On review, the court observed that while "Wis. Stat. § 901.07 references only written or recorded statements, the court in *State v. Sharp*, 180 Wis.2d 640, 511 N.W.2d 316 (Ct.App.1993), determined that a common law rule of completeness continues to exist for oral statements in Wisconsin."[2]

At its open rules conference on October 24, 2016, the court expressed concern about possible confusion arising from the proposed use of the phrase "recorded or unrecorded statement" and the proposed omission of the term "writing."

In response to the concerns of the court, the Judicial Council recommends the following amendment:

> When any part of a writing or ~~recorded~~ statement ~~or part thereof~~, whether recorded or unrecorded, is introduced by a party, an adverse party may require the party at that time to introduce any other part or any other writing or ~~recorded~~ statement which ought in fairness to be considered contemporaneously with it to provide context or prevent distortion.

This amendment is consistent with *State v. Eugenio*, which acknowledged that the rule of completeness is applicable to oral testimony, and with *State v. Anderson*, which

[1] 219 Wis. 2d 391, 410, 579 N.W.2d 642, 651 (1998).
[2] *Id.* at 650.

provided guidance on how, and when, to apply the rule of completeness.[3] "The rule of completeness, however, should not be viewed as an unbridled opportunity to open the door to otherwise inadmissible evidence. Under the rule of completeness the court has discretion to admit only those statements which are necessary to provide context and prevent distortion. The circuit court must closely scrutinize the proffered additional statements to avert abuse of the rule…'[A]n out-of-court statement that is inconsistent with the declarant's trial testimony does not carry with it, like some evidentiary Trojan Horse, the entire regiment of other out-of-court statements that might have been made contemporaneously.' "[4]

B. Wis. Stat. § 906.08, Evidence of Character and Conduct of Witness

The Judicial Council originally proposed an amendment to Wis. Stat. § 906.08(2) to replace the term "credibility" with "character for truthfulness." At its open rules conference on October 24, 2016, the court asked the Judicial Council to evaluate the use of the term "credibility" in the rules of evidence and to advise the court if there are other instances in which the term "credibility" should be replaced with "truthfulness" or "character for truthfulness." The court expressed interest in whether the proposed language tracks the corresponding Federal Rules of Evidence and asked the Judicial Council to explain differences. The court also inquired whether relevant advisory notes

[3] *State v. Eugenio*, 219 Wis.2d 391, 410, 579 N.W.2d 642, 651 (1998) and *State v. Anderson*, 230 Wis. 2d 121, 600 N.W.2d 913 (Ct. App. 1991), review denied, 230 Wis.2d 275, 604 N.W.2d 573 (1999).

[4] *Eugenio*, 219 Wis.2d at 412 (citations omitted).

to the federal rule should be printed with the Wisconsin rule and asked the Judicial Council to expand the proposed Judicial Council Committee Note.

The Judicial Council enlisted the assistance of Daniel Blinka, Professor of Law, Marquette University Law School, to more fully explain the use of the term "credibility" in the rules of evidence.[5] Please see the memorandum from Professor Blinka, dated February 8, 2017, attached as Appendix 1.

In response to the concerns of the court regarding the text of the proposed amendment to s. 906.08, and based on the suggestions from Professor Blinka, the Judicial Council recommends the following amendment:

> (1) OPINION AND REPUTATION EVIDENCE OF CHARACTER. Except as provided in s. 972.11(2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:
> (a) The evidence may refer only to character for truthfulness or untruthfulness.
> (b) Except with respect to an accused who testifies in his or her own behalf, evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (2) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's ~~credibility~~ <u>character for truthfulness</u>, other than a conviction of a crime or

[5] Professor Blinka is the author of *Wisconsin Practice Series: Wisconsin Evidence*, 3d ed. (Thomson/West, 2008) (annual supplements), as well as many other books and articles on evidence law that are often relied upon by Wisconsin courts. *See, e.g.*, *State v. Payano*, 2009 WI 86, ¶ 55, 320 Wis. 2d 348, 384, 768 N.W.2d 832, 849; *State v. Marinez*, 2011 WI 12, ¶ 18, 331 Wis. 2d 568, 584, 797 N.W.2d 399, 409; *State v. Gary M.B.*, 2004 WI 33, ¶ 21, 270 Wis. 2d 62, 77, 676 N.W.2d 475, 483; *State v. Hurley*, 2015 WI 35, ¶ 62, 361 Wis. 2d 529, 574, 861 N.W.2d 174, 195, reconsideration denied, 2015 WI 78, ¶ 62, 865 N.W.2d 505.

an adjudication of delinquency as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross–examination of the witness or on cross–examination of a witness who testifies to his or her character for truthfulness or untruthfulness.

(3) TESTIMONY BY ACCUSED OR OTHER WITNESSES. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters which relate only to the witness's ~~credibility~~ character for truthfulness.

This proposed amendment is consistent with the federal amendment although the text of s. 906.08 is not identical to federal Rule 608.[6] Like the federal rule, the term "credibility" is used in subdivision (1) of the Wisconsin rule. Consistent with the recommendation of the federal Advisory Committee, the Judicial Council found it

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[6] Rule 608 of the Federal Rules of Evidence states: **(a) Reputation or Opinion Evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
(1) the witness; or
(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

unnecessary to substitute "character for truthfulness" for "credibility" in s. 906.08(1) because sub. (1)(a) already serves to limit impeachment to proof of such character.

The proposed amendment also contains an expanded Judicial Council Committee Note which reproduces the relevant text of the federal Committee Note. The last paragraph of the federal Committee Note was omitted because the Judicial Council believes it is no longer relevant. Since 2003, federal Rule 609 has been amended and the proposed amendments to Wisconsin's rules also contain a recommended amendment to s. 906.09. Professor Blinka was consulted and expressed his opinion that "credibility" is used appropriately in s. 906.10.[7]

C. Wis. Stat. § 906.09, Impeachment by Evidence of Conviction of Crime

Upon beginning its study of Wis. Stat. § 906.09, one of the Judicial Council's Evidence & Civil Procedure Committee's first observations was that the Wisconsin rule differs substantially from its federal counterpart, Rule 609 of the Federal Rules of Evidence. When compared to the current Wisconsin rule, the federal rule is much more restrictive in terms of crimes that can be used for impeachment purposes.[8]

[7] Appendix 1, page vi.
[8] FED. R. EVID. 609 ("…the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement.")

The committee considered and dismissed a recommendation to adopt a rule based on the federal model, in part due to feedback from prosecutors who asked the Evidence & Civil Procedure Committee not to disturb settled Wisconsin case law.[9]

Judicial members of the Evidence & Civil Procedure Committee observed that when applying s. 906.09, the trend has been moving toward greater analysis by the judge. The result is that more convictions are now excluded, especially if they are very old convictions. Committee members considered the guidance available to the court for conducting an analysis to exclude convictions under sub. (2), and generally agreed that the current rule does not provide sufficient guidance within the text of the rule.

The committee considered several options for amendment and ultimately agreed that codification of the criteria found in Wisconsin case law was a balanced approach that would meet the needs of practitioners and the courts, while respecting the concerns raised by prosecutors.

At its open rules conference on October 24, 2016, the court asked the Judicial Council to reevaluate the use of the term "credibility" in s. 906.09 (1) and (2). The court also asked the Judicial Council to reconsider the recommendation of the Legislative Reference Bureau to add the phrase: "all of the following" and also to address whether the enumerated factors should include a reference to expungement.

In response to the court's concerns, the Judicial Council recommends the following amendment:

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[9] Minutes from the Judicial Council's Evidence & Civil Procedure Committee, dated July 12, 2011 (copy on file with author).

(1) GENERAL RULE. For the purpose of attacking ~~the credibility~~ character for truthfulness, ~~of~~ a witness~~, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible.~~ may be asked whether the witness has ever been convicted of a crime or adjudicated delinquent and the number of such convictions or adjudications. ~~The party cross-examining the witness is not concluded by the witness's answer.~~ If the witness's answers are consistent with the previous determination of the court pursuant to subsection (3), then no further inquiry may be made unless it is for the purpose of rehabilitating the ~~credibility of the witness~~ witness's character for truthfulness.

(2) Exclusion. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Factors for a court to consider in evaluating whether to admit evidence of prior convictions for the purpose of attacking a witness's truthful character include:
(a) The lapse of time since the conviction.
(b) The rehabilitation or pardon of the person convicted.
(c) The gravity of the crime.
(d) The involvement of dishonesty or false statement in the crime.
(e) The frequency of the convictions.
(f) Any other relevant factors.

(3) Admissibility of conviction or adjudication. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the ~~judge~~ court determines pursuant to s. 901.04 whether the evidence should be excluded.

(5) Pendency of appeal. The pendency of an appeal therefrom does not render evidence of a conviction or a delinquency adjudication inadmissible. Evidence of the pendency of an appeal is admissible.

The amendment to sub. (1) is intended to conform the rule more closely to current practice. It is consistent with *Nicholas v. State* and *State v. Bailey*.[10] The amendment recognizes that the court can, and often does, conclude that the "correct" number of convictions for impeachment at a given trial is a number less than the "truthful and accurate" number.

[10] *Nicholas v. State*, 49 Wis.2d 683, 183 N.W.2d 11 (1971) and *State v. Bailey*, 54 Wis.2d 679, 690, 196 N.W.2d 664, 670 (1972).

The amendment also replaces the term "credibility" with the phrase "character for truthfulness" in sub. (1). As Professor Blinka explains, there are several reasons for this amendment: "First, § 906.09 is limited to a witness's truthful character; the prior convictions may not be used for any other inference regardless. Second, the changes would helpfully harmonize § 906.09 with proposed § 906.08. Third, the language would conform to current Fed. R. Evid. 609(a), which also helpfully substituted the phrase 'character for truthfulness' for the term 'credibility.'"[11]

The amendment to sub. (2) continues to recognize the long-standing principle that this statutory exclusion is a "particularized application" of s. 904.03.[12] It codifies the holding in *Gary M.B.* that circuit courts are required, in determining whether to admit or exclude prior convictions, to examine a number of factors.[13] In *Gary M.B.*, the majority observed that "in the future, it would be prudent for circuit courts to explicitly set forth their reasoning in ruling on § 906.09(2) matters in order to demonstrate that they considered the relevant balancing factors applicable in the case before them."[14] Chief Justice Abrahamson notes, "[t]he purposes of requiring a circuit court to perform this process on the record are many. The process increases the probability that a circuit court will reach the correct result, provides appellate courts with a more meaningful record to

[11] Appendix 1, page iv.
[12] *State v. Gary M.B*., 2004 WI 33, ¶ 21, 270 Wis. 2d 62, 81, 676 N.W.2d 475, 485.
[13] *Id.* at majority op., ¶ 21; Chief Justice Abrahamson's dissent, ¶ 56; Justice Sykes' dissent, ¶ 85, *State v. Kuntz,* 160 Wis.2d 722, 752, 467 N.W.2d 531 (1991); *State v. Kruzycki,* 192 Wis.2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995); *State v. Smith,* 203 Wis.2d 288, 295-96, 553 N.W.2d 824 (Ct. App. 1996).
[14] 2004 WI 33, ¶ 35, 270 Wis. 2d 62, 87-88, 676 N.W.2d 475, 488.

review, provides the parties with a decision that is comprehensible, and increases the transparency and accountability of the judicial system."[15]

The proposed Judicial Council Note accompanying the recommended amendment clarifies that in conducting the balancing test, the circuit court need only consider those factors applicable to the case.[16]

The Judicial Council reevaluated whether the enumerated factors should include a reference to expungement and concluded that is more appropriate to reference expungement in the accompanying Committee Note. The proposed Judicial Council Committee Note explains that the list of factors does not include expungement because evidence of a conviction expunged under Wis. Stat. § 973.015(1) is not admissible under this rule.[17]

II. Creation of Bias Rule

The Judicial Council recommends creating the following rule:

> 906.16. Bias of Witness. For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

The United States Supreme Court has recognized the propriety of impeaching with evidence of bias, prejudice, or interest, despite the fact that such a medium of

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[15] *Id.* at Chief Justice Abrahamson's dissent, ¶ 48.
[16] *Kuntz*, 160 Wis.2d at 753, 467 N.W.2d 531.
[17] *State v. Anderson*, 160 Wis.2d 435, 437 (Ct. App. 1991).

impeachment, long recognized at common law, is not expressly mentioned in the Federal Rules of Evidence.[18]

> Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence [that] might bear on the accuracy and truth of a witness' testimony....[19]

The Uniform Law Commission has recommended a rule recognizing bias as a form of impeachment. The bias rule proposed in the accompanying petition is adopted from Uniform Rules of Evidence 616, which codifies *United States v. Abel.* Minnesota also has adopted this bias rule.[20]

As the court of appeals noted in *State v. Long*, Wisconsin law is in accordance with the principle set forth in *Abel,* so the proposed bias rule codifies the common law in Wisconsin.[21] The Judicial Council views codification of a bias rule as useful to reiterate that bias, prejudice, or interest of a witness is a fact of consequence under Wis. Stat. § 904.01. Further, the rule should make it clear that bias, prejudice, or interest is not a collateral matter, and can be established by extrinsic evidence.[22]

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[18] *United States v. Abel,* 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984).
[19] *Abel*, 469 U.S. at 52.
[20] Minn. R. Evid. 616, adopted Dec. 28, 1989, eff. Jan. 1, 1990.
[21] *State v. Long*, 2002 WI App 114, ¶ 18, 255 Wis. 2d 729, 647 N.W.2d 884 (Ct. App. 2002).
[22] *State v. Williamson*, 84 Wis. 2d 370, 383, 267 N.W.2d 337, 343 (1978) ("The bias or prejudice of a witness is not a collateral issue and extrinsic evidence may be used to

At its open rules conference on October 24, 2016, the court asked the Judicial Council to explain how this proposed rule compares with the Uniform Law, the decision to use the term "credibility" in this section, whether extrinsic evidence should be referenced in the language of the rule, and to discuss *State v. Williamson*, 84 Wis. 2d 370, 383, 267 N.W.2d 337, 343 (1978) and how it relates to the proposed amendments.

The proposed bias rule is identical to Uniform Rule 616 and Minn. R. Evid. 616, and Professor Blinka notes that the Uniform Rule "has the virtue of brevity."[23]

With regard to the use of the term "credibility" in this section, Professor Blinka opines that "[t]he proposed bias rule appropriately uses the term 'credibility.' The bias or interest of a witness may be relevant to prove the witness is lying or mistaken. Bias is not narrowly focused on truthful character, unlike § 906.08 and § 906.09. A witness's bias may induce mistakes as well as lies. For example, experts who earn substantial income by testifying may well be induced to shade their opinions to earn a fee. Whether the shaded testimony is a fabricated opinion (lie) or a subconscious overstatement (honest but mistaken), the witness's financial stake is relevant to his or her credibility. The same holds for personal relationships and emotions. Juries are well-positioned to sort out these issues."

The court inquires whether extrinsic evidence should be referenced in the language of the rule. The Judicial Council considered this issue and recommends a rule

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prove that a witness has a motive to testify falsely…The extent of the inquiry with respect to bias is a matter within the discretion of the trial court.").

[23] Appendix 1, page v.

that mirrors the Uniform Rule instead of departing from it to reference extrinsic evidence in the text of the rule. Minnesota has the exact rule that is being proposed and Professor Blinka notes, "Minnesota has had no apparent difficulties."[24] Professor Blinka also agrees that "[t]he Judicial Council Committee Note accurately explains that bias is not a 'collateral' issue and may be established by extrinsic evidence."[25]

With regard to how *State v. Williamson* relates to the proposed amendment, Professor Blinka confirms that "[t]he proposed rule is consistent with *State v. Williamson,* 84 Wis.2d 370, 383, 267 N.W.2d 337 (1978) and dozens of other cases." However, he adds that "…wide latitude has never been equated to free rein. A trial judge has authority to curb cross-examinations and regulate extrinsic evidence to avoid witness harassment, confusion, and 'waste of time.' Wisconsin case law has long held that '[r]elevant evidence of the issue of bias must also satisfy § 904.03.' *Williamson*, 84 Wis.2d at 384. Minnesota and Indiana, which have similar rules, follow the same tack."[26]

III. Proposed Effective Date and Enabling Language

At its open rules conference on October 24, 2016, the court asked the Judicial Council to include a proposed effective date and enabling language when it submits a revised petition.

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[24] *Id.*
[25] *Id.*
[26] *See* Miller, Indiana Evidence § 616.01 at 1052 (4th ed.).

The Judicial Council originally proposed a July 1, 2017 effective date. However, the Judicial Council now proposes a January 1, 2018 effective date to allow the bench and bar sufficient time to be apprised of the amendments.

When the court previously amended the rules of evidence in 1973, the new rules applied to pending actions "except to the extent that in the opinion of the trial court their application to a particular action or proceeding then pending would not be feasible or would work injustice in which event the former rule applies."[27]

Similar language was recently adopted by this court and the Judicial Council agrees that the language recently used by this court is appropriate in this case, as follows:

> …the rule adopted pursuant to this order shall apply to court proceedings commenced after the effective date of this rule and to any proceedings within a court proceeding then pending, except insofar as, in the opinion of the circuit court, application of the rule change would not be feasible or would work injustice, in which event the former rule applies.[28]

CONCLUSION

Wisconsin's Rules of Evidence were adopted by this court, effective January 1, 1974.[29] Over the years since their adoption, some deficiencies and gaps in the rules have developed, many of which have been addressed by case law.

The changes proposed in the Judicial Council's amended petition reflect the outcome of its multi-year study of Wisconsin's Rules of Evidence. The goal is to bring

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[27] Sup. Ct. Order, 59 Wis. 2d R1 (1973).
[28] 2017 WI 13.
[29] Sup. Ct. Order, 59 Wis. 2d R1 (1973).

Wisconsin's evidentiary rules more closely in line with case law and practice. The proposed amendments are designed to improve the quality of legal practice in this state and reduce the number of errors and appeals, increasing court efficiency and effectiveness.

Dated March 23, 2017

RESPECTFULLY SUBMITTED,

WISCONSIN JUDICIAL COUNCIL

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